CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

GLORIA SCOTT AND *
DEANIA JACKSON *
* NO. 96-8461
VERSUS * DIVISION "I"
* SECTION 14
THE AMERICAN TOBACCO *
COMPANY, INC., ET AL. *
*
* * * * * * *

Transcript of proceedings before The Honorable Richard J. Ganucheau, Judge Pro Tempore, Civil District Court, Parish of Orleans, State of Louisiana, 421 Loyola Avenue, New Orleans, Louisiana 70112, commencing on June 18, 2001.

* * * * *
Monday Afternoon Session
February 24, 2003
1:37 p.m.
* * * * *

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I N D E X

WITNESS: PAGE

WILLIAM A. FARONE, Ph.D.....14752

P R O C E E D I N G S

THE LAW CLERK:
Recess is over. Court will come to order.

THE COURT:
Please be seated.

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Are we ready to conduct a hearing on the defendants' objections to the exhibits or the documents and the demonstrative aids that may be used with Dr. Farone's testimony?

MR. GAY:

Yes, Your Honor.

MR. STEPHEN HERMAN:

Yes, Your Honor.

THE COURT:

It's my understanding that there are eight exhibits that have not yet been admitted in evidence which are objected to, and one exhibit which has been admitted into evidence which is objected to.

Do the defendants agree with that?

MR. GAY:

I haven't really analyzed it that way, but I'll take The Court's --

THE COURT:

Do you have your list of exhibit numbers there that you're ready to deal with, Mr. Gay?

MR. GAY:

I do, Your Honor. I have their demonstrative and exhibit numbers.

THE COURT:

All right. Let's look at 3719. My notes indicate that exhibit was admitted on February 13. And it's objected to today. I'd like an explanation of that.

3719.

MR. GAY:

Your Honor, we'll withdraw our objection to that.

I've got some that I've looked at over the lunch hour, Your Honor, that I can tell you right now that we will withdraw.

THE COURT:

Well, give me that. That will cut my list down a little bit.

MR. GAY:

Yes, sir.

WF-1, WF-4, WF-9, WF-18, WF-20 and 3743, Exhibit 3743.

THE COURT:

I don't -- 3743. WF-1, 4, 9, 18, 20 and 3743 objections are withdrawn?

MR. GAY:

Yes, Your Honor.

THE COURT:

Okay.

All right. I'd like to start with the exhibits and I would like to take them in the following order: 0138.01.

Do we have it?

THE SPECIAL MASTER:

I don't have exhibits.

MR. GAY:

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Had you withdrawn this, Steve?
MR. STEPHEN HERMAN:
Your Honor, we might not have to get to that. The issue is this: There is a demonstrative that is what I would consider to be a summary exhibit that was used in the Washington trial.
That exhibit -- Well, there's actually three of them. Those exhibits have specific quotes from documents that are on the plaintiffs' list.
THE COURT:
You said those exhibits have specific quotes.
MR. STEPHEN HERMAN:
I'm sorry.
THE COURT:
Do you mean those demos have specific quotes?
MR. STEPHEN HERMAN:
What was used in Washington as a demo has specific quotes to specific documents which were on the Scott exhibit list.
Those three, what were used as demonstratives, are all included by Dr. Farone in his reliance list. The plaintiffs would like to use quotes from his reliance list which are in those that summary exhibit or demonstrative, or whatever you want to call it.
They have objected and said that that's not sufficient. So we have provided four

alternatives: Which is to use a demonstrative that just has the quote and nothing else from the document; to use the underlying document, the Scott trial exhibit, which we're free to use, which I believe we should be able to use; and if, for whatever reason, that's not sufficient because those two things are not deemed to be on his reliance list, then what we've done is we've taken the demonstrative that is on his reliance list, which has a Scott exhibit number, but which was referenced to Washington trial exhibit numbers, and we created a summary exhibit under 1006 using the Scott trial exhibit numbers. For the documents that we could not find a Scott trial exhibit number for, we excluded them from the list and I believe that we provided those revised summary documents to defendants. If not, I apologize.
But we might not have to get to that if we have a ruling from Your Honor as to whether a document that's quoted in a reliance document either can be used or the quote can be used.
THE COURT:
But isn't the threshold question whether

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that reliance document goes in evidence? If he relies on it and does it come into evidence, you can't put anything before the jury that's extracted from that document; can you?

MR. STEPHEN HERMAN:

Well, he's relying on the statement. The statement is in the Scott trial exhibit. I'm not sure why he can't use -- rely on the Scott trial exhibit.

THE COURT:

Well, what demonstrative aids are you referring to that rely on 0138.01?

MR. STEPHEN HERMAN:

WF-7 is a demonstrative which is a direct quote that appears in the original Scott Exhibit 0138.01 and the revised Scott Exhibit 0138.01. The actual document that that comes from is Scott Exhibit 3451.

I would seek -- I think that that's sufficient to include or describe 3451 as a reliance document. If Your Honor disagrees, then we should, at the very least, be able to show the quote that he actually relied on.

But I think the ultimate -- the threshold admissibility question that Your Honor was referring to, I think, is a threshold admissibility question with respect to Exhibit 3451, not a threshold exhibit -- not a threshold admissibility question with respect to 0138.01.

THE COURT:

I'd be a lot better able to deal with it if I had in front of me those two exhibits, which I don't.

Michelle.

MR. STEPHEN HERMAN:

May I approach, Your Honor?

(Whereupon a discussion was held off the record.)

THE COURT:

I've got WF-7 in front of me, but I don't have those two exhibits.

THE SPECIAL MASTER:

This is 3451.

THE COURT:

Is this 0138.01 (indicating)?

MR. STEPHEN HERMAN:

That is what we have amended. The original one with the quote that's at issue is right here (indicating). This is what is in Dr. Farone's reliance list. I think it's also in that folder, a copy of it.

THE COURT:

I have a photocopy in there. But what is this (indicating)?

MR. STEPHEN HERMAN:

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What we did was we took the 0138.01 that was originally listed and we replaced the Washington exhibit numbers with Scott trial exhibit numbers. That is just a reproduction, a recapitulation of 0138.01 with Scott trial exhibit numbers, so that it would hopefully conform with Article 1006. And for the ones that we couldn't -- the ones on the original 0138.01 that we couldn't find Scott exhibit numbers for, we just deleted those quotes.

(Whereupon a discussion was held off the record.)

THE COURT:

All right. We want to talk about 3451, I presume?

MR. STEPHEN HERMAN:

I would like to, Your Honor.

THE COURT:

All right. It's indicated that the defendants object to that on the grounds of authenticity, not a clean copy, not relevant, 403 and hearsay.

MR. STEPHEN HERMAN:

Yes, Your Honor.

THE COURT:

Mr. Gay?

MR. GAY:

Your Honor, it's also not on his reliance list. Here's the confusion that we struggled with practically all weekend, which I think The Court is struggling with right now.

What the plaintiffs have done is they've listed these Washington A.G. demonstratives, 0138.01 and 0137.01. Mr. Herman mentioned a third one, I'm not familiar with the third one. But these are demonstratives that came out of the case against the industry by the Washington Attorney General. These were on his reliance list. But they're demonstra-tives, and all they are are snippets out of documents is what these are.

And so what the plaintiffs have now

attempted to do is go, because the documents that these quotes come from were not on the reliance list, what they've gone and done, now they've done a run around the reliance list and they've said, well, the quote in the Washington A.G. demonstrative comes from a document that's on our exhibit list. And that's how it gets on the reliance list. That's how I understand what they did. It took us all weekend to figure this out.

But I don't think that that is an appropriate way to give us a reliance list, besides which -- So, number one, the

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document, the numbered document we're dealing with right now is not on the reliance list, unless you want to make it on the reliance list because there was a quote from the document out of the Attorney General's demonstrative.

Which I don't think is appropriate, Judge. We're supposed to know what documents he's going to use. And that's an inappropriate way to --

THE COURT:

Is 3451 on Dr. Farone's reliance list, Mr. Herman?

MR. STEPHEN HERMAN:

Is that number on his reliance list?

THE COURT:

Yes.

MR. STEPHEN HERMAN:

No, it's not.

THE COURT:

Okay.

MR. GAY:

And furthermore, to the document, Your Honor, this is a document that was already subject to a motion in limine that The Court granted, precluding this information from this interview in the Death in the West tape. This is another way not only to circumvent that ruling and get this document in; in other words, it's another way to get around what The Court has already done on a document that's not on his reliance list.

What they've done is they've taken transcripts that were part of Death in the West out of this document.

THE COURT:

Well, point out to me what on this document --

MR. GAY:

Yes, that document is --

THE COURT:

-- comes from 3451? Anything?

MR. GAY:

I beg your pardon, Your Honor? I didn't hear your question.

THE COURT:

Does anything on this document come from 3451?

MR. GAY:

Yes, I think there's some quote from 3451 on here.

THE COURT:

And how would I identify that? Look in the left margin maybe? No.

MR. GAY:

It's not clear. It's not clear, Your Honor.

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THE COURT:
Well, let me ask Mr. Herman.
MR. STEPHEN HERMAN:
Yes, it's right -- it's highlighted for you. It's right here (indicating). In fact, that quote is the exact same quote that's on WF-5 -- I mean, WF-7.
MR. GAY:
Where is the highlighted portion?
(Whereupon a discussion was held off the record.)
THE COURT:
Mr. Herman, tell me how you think that this document -- I'm referring to this document (indicating), the page you've highlighted, which is Bates number 4089, and I'll send it back to you because I have it -- how does listing that get 3451 in based on the Case Management Orders in this case?
MR. STEPHEN HERMAN:
First of all, I don't think this even applies to the provision because Dr. Farone is not using this document to support any opinion testimony he has. He is only asked or going to be asked to give his own personal factual testimony about the statements in

this -- that's made by Philip Morris at this time.
Second of all, to the extent --
THE COURT:
Are you telling me you don't intend to attempt to offer 3451 into evidence?
MR. STEPHEN HERMAN:
I do.
THE COURT:
You intend to offer?
MR. STEPHEN HERMAN:
Excuse me?
THE COURT:
Do you intend to offer Plaintiffs' Exhibit 3451 into evidence?
MR. STEPHEN HERMAN:
Yes, at some point over the course of the trial. We don't necessarily have to do it tomorrow.
THE COURT:
No, we're talking about Dr. Farone's testimony and whether or not he can refer to it.
MR. STEPHEN HERMAN:
Well, I guess it depends on your ruling. I mean, the answer is I don't think anything in 3451 is relevant to Dr. Farone's testimony. I don't intend to ask him about anything on 3451 other than what's in the demonstrative, which is exactly the quote that is quoted in his reliance documents, which they've been put on notice of since

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this was listed as a reliance document.
THE COURT:
This being the reliance document (indicating)?
MR. STEPHEN HERMAN:
Yes. And they have --
THE COURT:
How do they know that interview of James Bowling, V.P., PM by Peter Taylor, Thames Broadcasting Company, London is 3451?
MR. STEPHEN HERMAN:
How do they know that?
THE COURT:
How would they know that?
MR. STEPHEN HERMAN:
I guess the same way that I figured it out.
THE COURT:
I'm sorry?
MR. STEPHEN HERMAN:
Well, first of all, the same way that I figured it out. Second of all, it's listed as Exhibit 1483 in the Washington case. I assume Philip Morris has a copy of Exhibit 1483 from the Washington case. They can compare the documents.
But to the extent -- I mean, or they could have asked him in a deposition, which they elected not to take. But I thought the purpose of the reliance list was to let them know what quotes, what evidence, what statements does Dr. Farone rely upon for his

opinions?
And, A., he's not relying upon these statements in his opinion; and, B., the statement is given to them.
THE COURT:
Well, I construe the reliance list as a list of documents. They said 3451 is not on his reliance list. This quote comes from 3451; does it not?
MR. STEPHEN HERMAN:
Yes.
THE COURT:
To what extent is 0138.01 a duplication of this document entitled "Disease Causation"? Is it a repetition of this document or is it an alteration of this document? What is it?
MR. STEPHEN HERMAN:
It is -- It's a repetition altered to the extent that the Washington exhibit numbers are replaced with Scott exhibit numbers. And to the extent that if we couldn't find the Scott exhibit number, which I think happened in one or two cases, we deleted it.
THE COURT:
So that's the reason the first item on

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the document entitled "Disease Causation" doesn't appear on 0138.01?
MR. STEPHEN HERMAN:
I believe that that -- that that's right. We couldn't find a Scott exhibit

number.
THE COURT:
Well, your exhibit number on the "Disease Causation" document, which I presume is a Washington State case exhibit number, 63, and the date is February 23, 1955, "American Tobacco Company Press Release," that doesn't appear on 0138.01.
And you're saying the reason it doesn't appear is because there's not a Scott trial exhibit number for the American Tobacco press release of February 1955?
MR. STEPHEN HERMAN:
At least not that we can locate recently.
THE COURT:
Is 0138.01 on the reliance list?
MR. STEPHEN HERMAN:
Yes.
MR. GAY:
No.
THE COURT:
Do you agree?
MR. GAY:
No, I don't.
What was on the reliance list is just this demonstrative from the Washington A.G. case, Judge, which again --
THE COURT:
Mr. Gay, I'm looking at his reliance list. And I see 0138.01 --
MR. GAY:

Right.
THE COURT:
-- on the second page. No? It's this (indicating).
MR. GAY:
But that came -- I don't know when they did that, Judge. I haven't -- This is what was on the reliance list (indicating).
THE COURT:
Well, they both bear the same number.
MR. GAY:
Yeah, I agree with that, 0138.01.
THE COURT:
0138.01.
MR. GAY:
Yes.
And trying to figure out what it was they were referring to was our task. And that's no way to do a reliance list, anyway. You know, we have an underlying fundamental

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objection to this document as well, the compilation of snippets out of documents.
We have a 1006 and a 100 --
THE COURT:
Well, how is your 0138.01 identified as such, Mr. Gay? Do you have a file folder with "Plaintiffs' Exhibit 0138.01" written on it and some stuff on the inside of that file folder?
MR. GAY:
Yes. This is what I have, Your Honor (indicating).

THE COURT:
Do you deny you ever saw this?
MR. GAY:
I think we got this recently.
You're talking about the one now that is sanitized from --
THE COURT:
Yes.
MR. GAY:
-- from the "Disease Causation" one?
THE COURT:
Yes.
MR. GAY:
I think we got these on Thursday, Judge.
THE COURT:
Mr. Herman?
MR. STEPHEN HERMAN:
I think that's right.
MR. GAY:
What we got was a WF-57. It doesn't have a --
THE COURT:
Okay. I want to talk about 0138.01.
MR. GAY:
Well, what we got --
THE COURT:
I have two documents that have that same exhibit number on them. And I'll refer to the "Disease Causation" as the original 0138.01 and the --
MR. GAY:
We never got a 0138.01 other than the

Washington A.G. demonstrative (indicating).
THE COURT:
Until Thursday?
MR. GAY:
Until Thursday.
And what we got was WF-58. I can't find 0138.01 on it. It said, "Industry's Public Statements on Disease Causation" on it.
THE COURT:
But what you did get, the "Disease Causation," is more than the later 0138.01; is it not?
MR. GAY:

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More than what I -- what he gave us Thursday? It may be, Judge. I haven't compared the two.

THE COURT:

Well, Mr. Herman represents that they took the "Disease Causation" document and attempted to identify Scott exhibits which corresponded to the exhibits on the extreme left-hand side of the "Disease Causation" document. If they got a Scott exhibit number, they put it on the new 0138.01.

So do this for me. Look at the "Disease Causation" document, Page 1, and the new 0138.01, Page 1. Did you get those two before you?

MR. GAY:

I do, Your Honor.

THE COURT:

Okay. Look at the second entry on the

"Disease Causation" document.

MR. GAY:

The 5-27-57 entry?

THE COURT:

Yes.

That appears to be Washington State case Exhibit 87, May 27, 1957, speech by George Weissman, PM.

MR. GAY:

Yes.

THE COURT:

That corresponds to the first entry on the first page of the new 0138.01; does it not?

MR. GAY:

It corresponds to a page which -- Yes, the first entry. I agree. Correct, Your Honor.

THE COURT:

So follow along with me.

Mr. Herman says when we sought to put Scott exhibit numbers on the sources identified in the "Disease Causation" 0138.01, in the situation where we could not find a Scott exhibit number for the document, we deleted it.

MR. GAY:

I heard that.

THE COURT:

So that the first entry on the "Disease Causation" 0138.01 is deleted.

MR. GAY:

Right.

THE COURT:

So the new 0138.01 contains some, but not all, of the references contained in the "Disease Causation" 0138.01.

MR. GAY:

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Yes.
THE COURT:
Okay. Are you with me there?
MR. GAY:
I'm with you.
THE COURT:
And you had -- And 0138.01 has a document, a plaintiffs' document, is listed on Farone's reliance list; is it not?
MR. GAY:
Correct.
THE COURT:
Okay.
MR. GAY:
Judge, if I may, just to follow up on that point, I'm looking at 0466.02, which is the exhibit they list for the 5-27-57 speech by George Weissman.
And just as an example, the 0466.02 that they list here is a Lorillard memorandum dated September the 2nd, 1983 from a C. H. -- from an L. R. Moroz, M-O-R-O-Z, to a C. H. Judge.
THE COURT:
So the Scott trial exhibit, you say, is not what they say it is?

MR. GAY:
Well, I'm just looking at my -- I'm happy to show it to The Court. 0466.02, which is the exhibit --
THE COURT:
Show it to Mr. Herman and ask him to explain it.
MR. STEPHEN HERMAN:
(Counsel reviews document.) It must be a mistake. I can't explain it. I'm sorry.
MR. GAY:
And I just might add that 0466.02 is not on the reliance list, either.
THE COURT:
Mr. Herman, can you tell me what Scott exhibit number for this speech by Mr. Weissman is?
MR. STEPHEN HERMAN:
No, Your Honor. I can't right now. I'm told that it's 3998.01.
THE COURT:
All right. Do you deem your informant reliable?
MS. SULZER:
Wait. Scratch that. I think they're duplicate documents.
MR. STEPHEN HERMAN:
Your Honor, I'm sure working with defendants otherwise, we can fit the exhibits that might be misidentified with the right number.
THE COURT:

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Well, it appears that 3998.01 is a speech by George Weissman entitled "Public Relations and Cigarette Marketing," a talk before the 1954 NATD convention in Chicago. That's a speech by Weissman, but the dates don't correspond.

MR. STEPHEN HERMAN:

Your Honor, I can't explain the discrepancy right now. But it's not even what we're going to ask the witness about.

It's 0446.02, not 0466.02.

THE COURT:

Say that again, please.

MR. STEPHEN HERMAN:

0446.02.

We'd be happy to change it. And if the defendants have some other discrepancies, we'll be happy to change those.

THE COURT:

So instead of 0466.02, it's 0446.02?

MR. STEPHEN HERMAN:

Yes, Your Honor.

MR. BRUNO:

According to our reliable sources.

THE COURT:

That's not on the reliance list, either?

MR. GAY:

That's correct.

MR. STEPHEN HERMAN:

That's correct.

THE COURT:

Well, would you agree that they've been

prejudiced at least to some extent by the wrong Scott trial exhibit number? If they look up 0466.02, speech by Weissman and 0466.02 is not a speech by Weissman, what must -- what should they then do in your view, Mr. Herman? So that they can have adequate notice in order to prepare whatever response or defense they might want to present?

MR. STEPHEN HERMAN:

Well, Your Honor, with all due respect, they haven't been prejudiced at all. They've had the original 00138.01 and 0137.01 and the Washington exhibits that that demonstrative was based on since Dr. Farone filed his expert report in the summer of 2000.

THE COURT:

Are you confident that there's no error in the exhibit number listed on the "Disease Causation" 0138.01 when it refers to the Washington State exhibits?

MR. STEPHEN HERMAN:

I'm not confident about that, Your Honor, but in the two and a half years that they've had, I would imagine that they could have discovered that. They could have deposed Farone, for one thing.

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But, in addition, Your Honor, if I could just say -- cast a little bit of a different light on Mr. Gay's argument in terms of prejudice, in particular, if I look at the CMO-2, and what it's asking for for reliance

documents, to my understanding, is data or other information considered by the witness in forming opinions.

And this information is not necessary, it doesn't have to be relied upon by Dr. Farone to form opinions, he's not going to be asked to give an opinion, he's not going to be asked to use this document to support opinions. Nevertheless, --

THE COURT:

When you say "this document," are you referring to the 0138.01?

MR. STEPHEN HERMAN:

Well, --

THE COURT:

One of the two 0138.01s?

MR. STEPHEN HERMAN:

Right.

THE COURT:

Okay.

MR. STEPHEN HERMAN:

I mean, --

THE COURT:

Just a moment.

Assuming that 0446.02 is the correct number for the Weissman May 1957 speech, that document number corresponds to the description of the document that we have, Speech to the Burley Auction Warehouse Association, Cumberland Falls, Kentucky. I don't know what P.I.D. stands for, but there's a 35-digit number behind P.I.D. in my

book. And I have the notation, "No objection found."

MR. GAY:

I haven't even looked at that document, Judge. I haven't been on -- There was no reason for me to look at it.

THE COURT:

Well, somebody looked at it, I presume?

MR. GAY:

At some point, yeah.

THE COURT:

And didn't object.

MR. GAY:

I --

THE COURT:

Do you have a duplicate of this for all exhibits?

Mr. Wittmann is shaking his head affirmatively. And you haven't decided yet.

MR. GAY:

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If Mr. Wittmann's got it, I'm sure I've got it.
THE COURT:
Well, what it is, it's a listing of exhibits and what objections. And I've been referring to it since this trial started. And I'm pointing out to you that 0446.02 is listed, it corresponds to the description of that document, and it contains on the right the notation, "No objection found."
MR. GAY:
Well, I don't doubt that that's what is

the situation.
THE COURT:
Okay.
MR. GAY:
But here is the problem.
THE COURT:
Now, let me ask you this. Do you have or do the defendants collectively have some compilation of the Washington State documents identified by number?
MR. GAY:
I've never seen it, Judge. I don't know what we have in that regard. All I can tell you is that when we get a reliance list, we look at --
THE COURT:
One more question.
Mr. Herman, how were the defendants supposed to know that the exhibit number on the left-hand margin or left-hand column on this, and I'm going to refer to it as Disease Causation Exhibit 0138.01, that those exhibit numbers refer to the Washington State litigation?
MR. STEPHEN HERMAN:
I think because at the bottom it says "WA DEM 241." But if there's any question, they could have --
THE COURT:
Mine doesn't have that notation.
MR. BRUNO:
Because yours is a clean copy, Judge.

THE COURT:
I'm sorry?
MR. STEPHEN HERMAN:
I'm told that that's because yours is a clean copy.
THE COURT:
What does it have on the bottom?
MR. STEPHEN HERMAN:
It has "WA DEM 241."
THE COURT:
And what does that stand for?
MR. STEPHEN HERMAN:
Washington Demonstrative 241.

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THE COURT:
Okay.
MR. STEPHEN HERMAN:
And they were defendants in the case.
THE COURT:
Okay. So the current 0138.01 is what I will call the 0138.01 revised.
MR. STEPHEN HERMAN:
Yes, Your Honor.
THE COURT:
With the Scott exhibit numbers.
MR. STEPHEN HERMAN:
Yes, Your Honor.
THE COURT:
As corrected.
MR. STEPHEN HERMAN:
As corrected.
THE COURT:
0446.02 is the first exhibit number.

MR. STEPHEN HERMAN:
Yes, Your Honor.
THE COURT:
Okay. The objection to 0138.01 is overruled.
MR. GAY:
Judge, I didn't even -- I don't feel I got a chance to even put our points up on 0138.01.
THE COURT:
Is there something you haven't said?
MR. GAY:
There was plenty I hadn't said. I hadn't said really anything about that. I was trying to -- I thought what we were trying to do is determine what's on his reliance list.
Now, this Washington A.G. demo was on his reliance list. And then now this new thing came out.
THE COURT:
0138.01 is on the reliance list.
MR. GAY:
Right.
THE COURT:
The original version of 0138.01.
MR. GAY:
Right. Which was this Washington demo.
THE COURT:
Okay.
MR. GAY:
And what we've been trying to deal with

here is the fact that, apparently, there's a new method of putting documents on your reliance list here. And that is by taking selected quotes out of some documents that are not on your reliance list, putting them in a demo on your reliance list and saying,

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well, that incorporates all the documents that are referenced in the demo into the reliance list.

THE COURT:

Well, Mr. Gay, if what's on the document that's on the reliance list -- and 0138.01 is -- and it contains an excerpt from 0446.02, erroneously called 0466.02, and just that quote, that's all that's going in.

MR. GAY:

Right. I understand.

THE COURT:

The whole document doesn't go in.

MR. GAY:

Okay. I understand, Your Honor.

MR. STEPHEN HERMAN:

Your Honor, --

MR. GAY:

But my --

THE COURT:

And you want to use the demo from the document, I presume?

MR. STEPHEN HERMAN:

Yes. And it only has that quote.

THE COURT:

You're winning at this point, Mr.

Herman. Have a seat.

Mr. Gay?

MR. GAY:

Yes.

And I guess for the record, Judge, since you've ruled already, I wanted to say that the objection to 0138.01 is based on Article 1006, which has to do with summaries. And summaries under 1006 deals with a summary of the document, not a snippet or an excerpt from the document.

And, basically, all they've done is taken snippets. And not only under 1006 is that inappropriate but under 1002 it's inappropriate as well. So with that, that's what I wanted to put on the record for 0138.01 and 0137.01.

THE COURT:

Now, well, 0137.01 is a new number. Where is 0137.01? And what is 0137.01?

MR. STEPHEN HERMAN:

It's a similar summary document created from a Washington demonstrative --

THE COURT:

Okay.

MR. STEPHEN HERMAN:

-- on his reliance list.

THE COURT:

And is everything we said about 0138.01 basically applicable to 0137.01 in terms of exhibit numbers in Washington State versus this litigation?

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MR. STEPHEN HERMAN:
Yes, Your Honor. Subject to any clerical errors.
THE COURT:
I don't have 0137.01 on Mr. Gianna's list of exhibit objections that remain to be decided.
THE SPECIAL MASTER:
It wasn't mentioned by the defendant.
THE COURT:
Mr. Gay, would you look at your notes with regard to 0137.01?
MR. GAY:
Is this not on your list?
MR. STEPHEN HERMAN:
I think it was -- It's in our brief as an alternative to WF-59 and WF-61.
MR. GAY:
Then if we just admit 59 and 61, 59 and 61 go in, this was an alternative to that; is that what you're saying?
MR. STEPHEN HERMAN:
I believe -- There's an exhibit which was 5712, two quotes of which are reproduced in 0137.01. Those two quotes have been reproduced in demonstrative WF-59 and WF-61.
MR. GAY:
So those --
MR. STEPHEN HERMAN:
And our suggestion was that if you objected to 5712 as not being on the reliance list, then we would use a revised 0137.01,

which is the revision of something that clearly is on the reliance list.
MR. GAY:
Well, then, you know, it's fine with me if we use WF-59 and WF-61. Then we won't have to worry about 0137.
MR. STEPHEN HERMAN:
Thank you.
THE COURT:
The next exhibit that is on my list of objections that needs to be decided is Exhibit 1030.
MR. STEPHEN HERMAN:
That's The Frank Statement, Your Honor. It's already in evidence as --
THE COURT:
Is that not in?
MR. STEPHEN HERMAN:
Yeah, it is.
Oh, I apologize, Your Honor. I thought we were referring to 0130. 1030 is not in evidence yet, I'm sorry.
THE SPECIAL MASTER:
Do you have a hard copy of that?
MR. STEPHEN HERMAN:
It's highlighted, but yeah.
(Whereupon a discussion was held off the

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record.)
THE COURT:
Do I have a copy of 1030?
THE SPECIAL MASTER:
You do now.

THE COURT:
Relevance, hearsay, and hearsay within hearsay, is that your objection? That's what I have in my compilation.
MR. GAY:
I don't understand what we're dealing with now, Judge.
THE COURT:
Excuse me?
MR. GAY:
I'm not sure what we're dealing with right at the moment. We're dealing with 1030, which is on his reliance list, or we're dealing with now 3509.01?
I'm just confused, Judge.
THE COURT:
I understand that there's a -- that Dr. Farone will use Plaintiffs' Exhibit 1030 as a document upon which he relies in giving his testimony. I further understand that the defendants will object to that document.
And this is your opportunity to argue your objections to that document.
MR. GAY:
Okay.
THE COURT:
I find it on Dr. Farone's reliance list.
MR. GAY:
Yes, Your Honor.
The objections are as they are listed. It's also the hearings before the FDA, before Congress, which I think have been excluded.

And on that basis, we would object.
And, further, Your Honor, there's the LPLA objection as well; that there's no relevance to this under the LPLA, which sets forth the exclusive remedies against manufacturers.
THE COURT:
Mr. Herman, do you wish to respond?
MR. STEPHEN HERMAN:
Yes.
On Noerr-Pennington and those related issues in the LPLA, Your Honor, has had, I think, two or three motions in limine, which have all been denied. I believe that some of the congressional testimony, I think 0573.01 was already admitted on February 7th.
And in regards to hearsay, their admissions -- Well, first of all, it's not really admitted for the truth of the matter asserted; it's admitted to show that the

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representations were made, not to show that they were true. So I don't even think that it falls under hearsay. To the extent that it is hearsay, it's an admission and/or a statement against interest.

THE COURT:

Just as an aside, do I have a copy of these exhibits as you're required? They don't have that yet?

MR. STEPHEN HERMAN:

I thought they were delivered on Friday.

THE LAW CLERK:

They were in boxes here this morning. They're gone now. I don't know where they are.

THE COURT:

Okay.

MR. GAY:

Your Honor, just to supplement, you entered a judgment in this case on the 27th of March, 2001 pursuant to defendants' motion in limine to exclude any evidence of or reference to FDA efforts to regulate nicotine. After considering the pleadings, arguments, you granted that motion.

THE COURT:

Yes.

The objections to Exhibit 1030 are overruled. It will be received into evidence.

Here, this is the plaintiffs' copy.

MS. SULZER:

Thank you.

THE COURT:

The next document I want to talk about is -- and I'm trying to do them in numerical order -- 2011, 2011.

THE SPECIAL MASTER:

That's on the reliance list.

MR. STEPHEN HERMAN:

Does Your Honor need a clean copy of that?

THE COURT:

I have it. It's in the folder.

This is labeled B & W. Is it purported to be a Brown & Williamson document, Mr. Herman?

MR. STEPHEN HERMAN:

Yes, Your Honor.

THE COURT:

And I see, Mr. Schneider, you're standing up. I presume you're going to talk about this?

MR. SCHNEIDER:

Yes, very briefly.

THE COURT:

The objections to that document were

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hearsay, relevance, authenticity and the 403 prejudice.

MR. SCHNEIDER:

Yes, which objections we'll stand on. I don't think we need to argue that.

The only other point I would make is this is a B & W document from 1980. This gentleman was working at Philip Morris at that time. And to the extent he's going to purport to talk as a fact witness about Brown & Williamson, we don't think he's competent to do that. He doesn't have personal knowledge of it.

He may try to fit this document within his expertise in some way. But, again, we do not think they're experts in documents. This gentleman hasn't been qualified as such. And for all those reasons, I don't think it should be used with Dr. Farone.

THE COURT:

Do I perceive that you are abandoning your authenticity objection?

MR. SCHNEIDER:

Yes.

THE COURT:

Okay. So it's your document. What parts of it do you think are within the 403 prejudice versus probative value issue?

MR. SCHNEIDER:

Well, I infer that the plaintiffs will attempt to use this as some reflection on manipulation of nicotine. They're going to have Dr. Farone talk about it from that perspective. My principal objection to it is it isn't tied in any way to the named plaintiffs.

But, in addition, this witness is from Philip Morris. And ought not be able to talk about events taking place at Brown & Williamson when he was at a different company. There's no expertise in that topic. And he does not have the personal knowledge to deliver forth on that as a fact witness. And for that reason, he should not be able to use it with this testimony.

THE COURT:

Well, I don't know what use will be attempted in connection with Dr. Farone's testimony, but -- I don't know that that's properly an objection to the document. It may be an objection to a question put to

Farone in his testimony. And maybe that requires a different consideration by me than the admissibility of the document.

MR. SCHNEIDER:

Maybe at the time they use that document, I'll renew this objection without

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going into it at length, and then Your Honor can make a call at that time.

THE COURT:

At this point, the objection to the document is overruled. And if you want to object to the question based on it, that can be done on a later date.

The next one, continuing again in numerical order, appears to be 3140.02? 3140.02. The Philip Morris U.S.A. website: "Our Mission and Values," is there an objection at this point?

MR. GAY:

There are two objections, Your Honor: One is that it's not on the reliance list; the other is that this is an event that occurred long after he left Philip Morris, and his factual testimony with respect to what occurred at Philip Morris would have nothing to do with this. It's clearly our website, and we say what we say on it.

THE COURT:

Mr. Herman?

I don't find it on the reliance list.

MR. STEPHEN HERMAN:

Well, Your Honor, I think it couldn't

have been on the reliance list because it's a version of the website posted after his reliance list was submitted. The Philip Morris website that was in place as of December 15th, 1999 is listed on Dr. Farone's reliance list as Exhibit 1025.

THE COURT:

But what's the relationship between 1025 and 3140.02?

MR. STEPHEN HERMAN:

They're the current public corporate statements of Philip Morris.

THE COURT:

But are they the same words or is it a different text?

MR. STEPHEN HERMAN:

It's different text, Your Honor.

I thought the defendants had admitted that if something came out after the reliance list was submitted, and it wasn't authored by the expert himself, that that could be added to the reliance list just as it could --

THE SPECIAL MASTER:

Everybody agreed to that.

THE COURT:

Well, --

MR. GAY:

Your Honor, that's true.

THE COURT:

Mr. Gianna says everybody agreed to that.

Mr. Gay?

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MR. GAY:
Yes, that's true as long as it didn't expand the opinions. If something new came out that was included in the report and was new and you supplemented your reliance list, that was perfectly fair game.
THE COURT:
Has the reliance list been supplemented?
MR. STEPHEN HERMAN:
That's never been the agreement to my knowledge, Your Honor.
MR. RUSS HERMAN:
That's never been the agreement, wasn't the agreement.
THE COURT:
But there's no question but that it's a Philip Morris publication?
MR. GAY:
No question about that, Your Honor.
MR. STEPHEN HERMAN:
And the --
THE COURT:
Is the content brand-new as compared to -- or brand-new since the date of Dr. Farone's report? Or is the content older material that's been restated?
MR. STEPHEN HERMAN:
I can't say with absolute certainty; but I believe, based on Dr. Carchman's testimony, that it was added at the end of 2000 or sometime around the time that Dr. Carchman was deposed. I'm not exactly sure about

that, but -- I believe it was new around the time that we deposed Dr. Carchman in November of 2000, which was six months after the expert report was submitted.
In addition, Mr. Gay talked about expanding what's in the expert report. The expert report for, I believe, three pages talks about -- maybe even more than that -- the efforts of the defendant currently to continue to mislead the public.
And, in addition, I do not intend to ask Dr. Farone about -- with this document to support his opinions but simply to make reference to factual testimony.
THE COURT:
And the demo based on this is 56?
MR. STEPHEN HERMAN:
I think there's several -- There's 52 through 56. There's four or five demonstratives.
THE SPECIAL MASTER:
2, 3, 4, 5 and 6, Judge. 52 through 56.
MR. GAY:
Your Honor, a couple other points, if I may.
THE COURT:
Yes, Mr. Gay.

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MR. GAY:
This expansion of the reports issue really evolved out of the continuing scientific information related to the Bourgeois doctrine, as I remember it. And

that is an evolving area of medical literature. And those things that came out about medical monitoring and smoking cessation and things like that were fair game, okay?
Now we're talking about company conduct issues here. And I know I've heard my opponents on the other side say a number of times that conduct after 1996 is not relevant to this case. I know I've heard that. And I don't think that this expansion of the expert report was ever intended to deal with that.
And I don't think that Dr. Farone has -- well, I don't think the plaintiffs have sought in any way to supplement his report with this information. So if we're going to suddenly start talking about efforts to mislead the public in the year 2002 or 2003, I think we're going way beyond what this case is all about.
MR. STEPHEN HERMAN:
Your Honor, can I say one thing?
THE COURT:
Yes, you may respond to that.
MR. STEPHEN HERMAN:
Well, we have somewhat of a new issue with Dr. Farone that's never been addressed with any of the other experts who have testified up until this time because he's both a fact witness and an expert.
And if 3140.02 is an admissible piece of evidence, which I don't even think they have

an objection to it, I think it's fair to show Dr. Farone their corporate mission right now, which they admit that a company should be doing and say, "Based on your experience at Philip Morris from 1976 to 1984, did the company do that?" It's not an opinion, it's not --
THE COURT:
But the response is going to be this is a newer document than that. This was not their mission or goal or value statement as of the time that Dr. Farone could give factual testimony about Philip Morris.
MR. STEPHEN HERMAN:
Well, but the testimony itself is about the time when Dr. Farone was at Philip Morris.
THE COURT:
Okay. It may be that you can ask him was Philip Morris' goal to be the most

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responsible, effective and respected developer, manufacturer and marketer of consumer products when you were there? And he maybe can answer that.

But this is a post-Farone employment at Philip Morris document. You may be able to ask him if those were the goals. But what's the relevance of this piece of paper to the time when he was there and the time during which he can give factual testimony about Philip Morris? That's my problem.

MR. STEPHEN HERMAN:

Well, I think the relevance is a contrast between what Philip Morris now admits it should have been doing at the time Dr. Farone was there and what they actually were doing.

THE COURT:

Does it say anywhere on here we should have been doing this during the years in question?

MR. STEPHEN HERMAN:

I don't believe it does, Your Honor. I think that's ultimately a question for the jury to decide.

THE COURT:

Dominic?

(Off the record conference between Your Honor and The Special Master.)

THE COURT:

The objection to 3140.02 is sustained.

MR. STEPHEN HERMAN:

That's just for use with Farone, Your Honor, or --

THE COURT:

Well, that's the context in which we're having these discussions.

MR. STEPHEN HERMAN:

Okay.

THE COURT:

If you offer it again and --

MR. STEPHEN HERMAN:

Thank you, Your Honor.

THE COURT:

-- I'll reconsider.

The next one in numerical order, it appears, is 3509.01. 3509.01.

MR. WITTMANN:

Your Honor, there's an objection to 3266 --

THE COURT:

I'm sorry?

MR. WITTMANN:

-- on the list that we have.

THE COURT:

Say that again.

MR. WITTMANN:

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Exhibit 3266, we have an objection to. It was on the list that the plaintiffs gave us. It's an RJR document which is not on their reliance list.

THE COURT:

Why are you talking about 3266? I'm talking about --

MR. WITTMANN:

Because you said you were going in numerical order, that's why.

THE COURT:

I don't have 3266 on my list.

MR. STEPHEN HERMAN:

Your Honor, --

MR. WITTMANN:

Has that been withdrawn?

MS. SULZER:

It's not on the short list.

MR. WITTMANN:

We didn't get the short list.

(Whereupon a discussion was held off the record.)

MR. STEPHEN HERMAN:

Your Honor, the plaintiffs do not intend to admit the document at this time. There's just a diagram in the document that the plaintiffs were going to use for illustrative purposes.

THE COURT:

What document are you referring to?

MR. STEPHEN HERMAN:

3266, the one that Mr. Wittmann is now raising.

THE COURT:

We're not going to talk about 3266 right now.

MR. WITTMANN:

Thank you, Your Honor.

THE COURT:

3509.

I have a memorandum from plaintiffs, a response to defendants' objections to 3509. And let's have the defense --

THE SPECIAL MASTER:

3509.01.

THE COURT:

Correct.

Philip Morris has objected to this document on the basis of relevance and --

MR. GAY:

It's not on the reliance list, Your

Honor. It's post Dr. Farone's employment, considerably post Dr. Farone's employment.

And as I understood what plaintiffs said on Scott Exhibit 1030, this was a substitute for Scott Exhibit 1030 if it didn't come in. And that's what I understand.

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THE COURT:
1030 is in.
MR. GAY:
Right.
So I don't know why this would now need to be a substitute for 1030. So, like the website, it is after Dr. Farone's employment, it is not on his reliance list, LPLA is the exclusive remedy with respect to manufacturers as of this point in 1994. For those reasons, we object to it.
THE COURT:
Mr. Herman, what demonstrative aids are going to be taken from 3509.01?
MR. STEPHEN HERMAN:
We didn't create any, Your Honor. If permitted, we were just going to use the document itself.
THE COURT:
Your memorandum says that this is not a document upon which Dr. Farone will rely as a basis of his opinion.
MR. STEPHEN HERMAN:
That's correct.
THE COURT:
That's what your supplemental response

to defendants' objections to Farone exhibits and demonstratives.
MR. STEPHEN HERMAN:
That's correct.
I think Dr. Farone will provide the jury with relevant evidence, indirect or circumstantial evidence, about whether these statements made to Congress and made to the public, which is addressed in Dr. Farone's expert report, were truthful.
THE COURT:
Did these statements come from the text of Exhibit 1030?
MR. STEPHEN HERMAN:
I don't believe they're lifted exactly from 1030. They are Philip Morris' summary and Philip Morris' presentation of what they testified to before Congress. It says at the top of the -- at the top of the FAX, it explains -- Philip Morris explains what it is.
THE COURT:
Yes. The heading says, "For your consideration, here are the highlights of the information presented by Philip Morris in that session." Obviously, the substance is taken from the Exhibit 1030.
I will sustain the objection to 3509.01 in connection with Dr. Farone's testimony.
The next in numerical order appears to be Exhibit 3743. 3743 has been withdrawn, I understand. So if that's correct, we don't

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have to consider that.
3746 then would be the next document, 3746. It appears on the reliance list. The objections I note in the Philip Morris documents are authenticity, hearsay, clean copy. Who will address this?
Mr. Gay, do you have the document in front of you?
MR. GAY:
Yes.
This is the document, Your Honor, that we could not find any basis to suggest who wrote it. And it just -- I see no basis upon which it could be authenticated. I note that it was found, apparently, in Dr. Osdene's files on April the 3rd, 1970, because there's a stamp on it, April 3rd, 1970 for T. S. Osdene.
But other than that, it has no indication of who wrote it, where it came from, what the purpose of it was, whether it was ever used in any fashion. So on that basis, we would object to it.
MR. STEPHEN HERMAN:
Your Honor, the pretrial objections that I have do not indicate that there's an authenticity objection. The only authenticity objection is not a clean copy. And the Philip Morris objections identify the author as Thomas Osdene. Maybe they're wrong about that. I don't know. It's on their website.

And in any event, Dr. Farone can provide the foundation for the document, what it was, what it was used for. He's here, if you want him to do that now.
THE COURT:
Yes, I'd like to have Dr. Farone at the witness stand.
(Whereupon Dr. Farone takes the stand at this time as follows:)
THE COURT:
You're still under oath.
THE WITNESS:
Yes, sir.
THE COURT:
I'm showing you a document that's identified as Plaintiffs' Exhibit 3746.
Have you ever seen that document?
THE WITNESS:
(Reviews document.) I have.
THE COURT:
Do you know what that document is?
THE WITNESS:
Yes.
THE COURT:
Do you know of your own knowledge?
THE WITNESS:
Yes.

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THE COURT:
Tell me what it is.
THE WITNESS:
Okay. I was shown this document by Mr. Richard Thomson, T-H-O-M-S-O-N, at the time

that I began employment at Philip Morris --
THE COURT:
Speak into the mike.
THE WITNESS:
Sorry.
-- at the time that I began employment at Philip Morris as suggested responses to people outside the company, should they ask employees questions about what the company was doing on smoking and health.
I also know that it is taken roughly from a Tobacco Institute document of several years earlier. And it was modified by Philip Morris and used with its employees at the Research & Development center to help them answer the questions that are discussed in this document.
THE COURT:
Thank you.
Mr. Gay, are there any questions that you want to ask Dr. Farone about that document?
MR. GAY:
When did Mr. Thomson show you this document?
THE WITNESS:
1976.
MR. GAY:
Okay. And this was -- Did you ever see it anywhere else other than with Mr. Thomson?
THE WITNESS:
There was -- Well, I've seen not this

identical document. There are several versions of this document, some of which are in more fancier form for handing out and things like that.
But I think this is derived from -- well, he told me and I saw the original was derived from a Tobacco Institute document from '71 or '72, which I may also have in my reliance list. I'm not sure.
MR. GAY:
And you said it was -- Do you know whether what this particular document was ever used for? Or was it ever used in any form, this particular document?
THE WITNESS:
Yes. This document as used with me was used to provide information as to how you might answer questions should people outside Philip Morris ask you about how, for example, what is in cigarette smoke that causes

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cancer? They have three questions. And then this is a suggested answer.

Because people who work at Philip Morris were constantly bombarded by these questions from their neighbors, from groups they might belong to.

THE COURT:

That's enough.

MR. GAY:

So was this the purpose of submitting this to the employees?

THE WITNESS:

The purpose was giving the information to the employees so that they could use it, yes.

MR. GAY:

To the employees of Philip Morris?

THE WITNESS:

Yes.

MR. GAY:

Okay. And that was the purpose you understood it to be?

THE WITNESS:

Yes.

MR. GAY:

Okay.

THE COURT:

Thank you.

The authenticity objection has been overcome. The document will be received. The objections are overruled.

Thank you. You can step down.

(Whereupon Dr. Farone is excused at this time.)

THE COURT:

The next on my list is Exhibit Number 3992.01.

THE SPECIAL MASTER:

Do you have it?

MR. STEPHEN HERMAN:

Oh, you need an extra copy?

MR. SHOLES:

Your Honor, if I may interrupt for just a moment. Would it be acceptable to The

Court if we were to ask Dr. Farone if he could sit outside just in case he has to be called to testify again?

I don't think we want him to hear the discussion about the document before he testifies about a document.

THE COURT:

You disagree with Mr. Sholes' suggestion?

MR. RUSS HERMAN:

This is a sequestration request. It comes a little late. And Dr. Farone is an expert witness. As far as I know in our

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courts, an expert witness can sit in on anything.

THE COURT:

Mr. Sholes, your request is denied.

3992.01. 3992.01 does not appear on the reliance documents list of Dr. Farone's report. But I have -- my listing of pleadings indicates no objection.

MR. GAY:

Your Honor, the issue with respect to this document is whether it's on his reliance list, and it's not; and whether this is going to be the subject of expert testimony or factual testimony.

THE COURT:

Mr. Herman?

MR. STEPHEN HERMAN:

It's going to be the subject of factual testimony. He's on the distribution list.

He can provide a foundation.

THE COURT:

Say that again.

MR. STEPHEN HERMAN:

He's on the distribution list and I believe he can provide a foundation, if you'd like him to.

MR. GAY:

It's a 1981 document, Your Honor. So if it's only going to be strictly factual testimony about the document and not be the basis upon which he formulates some opinion about mutagenicity or some other issue that's not part of his report -- or even if it were part of his report, he couldn't rely on this to do it -- then it's, I suppose, some sort of factual testimony which I can't predict at this point.

THE COURT:

Mr. Herman has represented that it's not a document that he will rely on to give expert opinion. And I don't believe it requires a ruling by me at this point. We'll see what develops when the testimony is elicited.

It's my opinion and I'll listen to some disagreement, if there is any, that any demonstrative aids that are based upon exhibits that have been -- as to which the objection has been overruled are usable; demonstrative exhibits based upon exhibits as to which the objections have been sustained

are not usable.

Now, any quarrel with that?

(No response.)

THE COURT:

Then what is left of the demos that I should look at that are not covered by that

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last statement?
Plaintiffs?
MR. STEPHEN HERMAN:
Yes. WF-5 is a videotape of the Philip Morris RL manufacturing process.
MR. RUSS HERMAN:
Your Honor, I might state for the record that I've agreed that Mr. Gay -- excuse me for sitting -- presented me with a protective order that's been in place or in place now even before this case began regarding these videos.
And I want to state for the record, even though I haven't had a chance to read what Mr. Gay gave me, I'm certainly -- I'm certain he's represented it correctly. And we agree that whatever protective order has been in place regarding videotapes will continue in the Scott case. And I'll be happy to read that over, sign it, file it in the record as soon as I get a chance.
Also, there was an objection raised to the videotape on the basis that it may have shown other folks' facilities. And we've gone through it. And the only facility is the Philip Morris facility. We do have a

tape of an RJR facility, but this isn't it. We don't have a tape of a Brown & Williamson facility and we don't have a tape of a Lorillard facility.
THE COURT:
Do you wish to respond to that, Mr. Gay?
MR. GAY:
Yes.
We'll go ahead -- I gave Mr. Herman a copy of the protective order. And we'll file that either this afternoon or in the morning, Your Honor. And it does have some requirements in it about who gets to see it in the courtroom and things like that.
The videotape, I thought, included videotape from other manufacturers. But Mr. Herman tells me that's not the case. I don't really know enough about it to tell you whether that's right or not.
THE COURT:
What's the length of the video?
MR. RUSS HERMAN:
Originally, it was like an hour and -- There were two videos. This one originally was -- what? -- an hour and a half, something like that. It's been edited down to eight months.
MR. STEPHEN HERMAN:
Four minutes.
MR. RUSS HERMAN:
Four minutes.
THE COURT:

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Four minutes.
MR. RUSS HERMAN:
And from the video, we have --
THE COURT:
Have the defendants been allowed to view that?
MR. STEPHEN HERMAN:
Yes.
THE COURT:
The four-minute tape?
MR. STEPHEN HERMAN:
Yes. I gave that to Mr. Long on either Thursday or Friday.
MR. GAY:
Yes, we've seen it, Your Honor.
THE COURT:
Have you seen it?
MR. GAY:
Yes.
THE COURT:
Do you object to it as altered, the four-minute version?
MR. GAY:
The only problems I have with the tape are some of the, like some of their demonstratives has -- and this may not be that big of a problem with the video -- but it has things like "DANGER" and --
THE COURT:
Labels on vats and containers and such?
MR. GAY:
Yes, things like that.

THE COURT:
I read the memorandum about that.
MR. GAY:
That that's a concern of ours, that that could be confusing to the jury. Whereas, the level of these things, the minuscule trace levels of things in cigarette smoke --
THE COURT:
I think you've got an adequate remedy with cross-examination.
MR. GAY:
All right. And the only other point we made was, Judge, that these videotapes are done, I think, in 1995 or thereabouts. They're certainly long after Dr. Farone left Philip Morris. And as a factual basis, I don't know how he would --
THE COURT:
Well, if he authenticates them as being fairly representative of the conditions when he was there, doesn't that take care of that problem?
MR. GAY:
I suppose it would, Your Honor.
MR. RUSS HERMAN:
We can offer to do that right now.
MR. STEPHEN HERMAN:

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Do you want him to do that right now?
MR. RUSS HERMAN:
We've had him do it. So he could take the stand right now and do it rather than interrupting the jury.

THE COURT:
Dr. Farone.
(Whereupon Dr. Farone takes the stand at this time as follows:)
THE COURT:
Again, Dr. Farone, you're still under oath.
Have you seen the final version of this video, the four-minute version that the plaintiffs intend to play before the jury tomorrow?
THE WITNESS:
Yes, I have.
THE COURT:
And how recently have you viewed that?
THE WITNESS:
Last night.
THE COURT:
Do the conditions and the general situation as depicted in that video conform to your recollection of those conditions and depictions when you were at Philip Morris -- when you were an employee of Philip Morris?
THE WITNESS:
They do as of 1984.
THE COURT:
All right. Mr. Gay, do you want to cross on that?
MR. GAY:
No, Your Honor.
THE COURT:
Step down.

(Whereupon Dr. Farone is excused at this time.)
THE COURT:
It seems that we've exhausted my list of things that I have to rule on today.
No?
MR. GAY:
Your Honor, I have a couple of concerns with some of the demonstratives.
THE COURT:
What I want to do is go through the list of demonstrative aids and see what's left after I have made the statement with regard to the demonstratives based on exhibits that have been admitted or objections sustained.
I have a list of the 61 demonstrative aids that will be used by Dr. Farone. Does everyone have this list? So let's go through the list and I'll -- Mr. Gay, I suppose is it only your objections or do the other

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defendants have objections?
MR. WITTMANN:
We have objections. We have an objection, Your Honor, in addition to whatever Mr. Gay might have.
THE COURT:
All right. Let's start from the top. And whoever on the defense side wants to object.
MR. GAY:
Your Honor, there is a short list that we've been working off of today.

THE SPECIAL MASTER:
The Judge has that. He's got that in here.
MR. GAY:
Okay.
THE COURT:
Well, I'm not sure I have it. It's probably attached to one of these memorandums; isn't it? I think I saw it. I just don't know where it is. And they have copies of this?
THE SPECIAL MASTER:
I copied theirs.
THE COURT:
Okay.
THE SPECIAL MASTER:
I think that's it.
THE COURT:
What does "W" mean in a circle?
THE LAW CLERK:
Withdrawn.
THE SPECIAL MASTER:
Withdrawn.
THE COURT:
All right.
(Whereupon a discussion was held off the record.)
THE COURT:
"1" is withdrawn?
MR. STEPHEN HERMAN:
The objection is withdrawn. That's my understanding.

MR. GAY:
The objection is withdrawn to 1, Judge.
THE COURT:
No objection to 2 and 3?
MR. GAY:
They've been withdrawn, as I understand it.
MR. STEPHEN HERMAN:
They've been withdrawn, that's right.
THE COURT:
4?
MR. GAY:
4 is -- The objection is withdrawn to 4.

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THE COURT:
5, the objection is overruled.
6?
MR. STEPHEN HERMAN:
I think the objection was argumentative.
MR. GAY:
We can withdraw that one, Your Honor.
THE COURT:
7?
MR. STEPHEN HERMAN:
7 is based on a document you've admitted. You want us to change the source from 3451 to 0138.01 on the demonstrative? We can make that change.
THE COURT:
Yes.
7? Mr. Gay? Anybody?
MR. STEPHEN HERMAN:
That was 7.

MR. GAY:
That was 7, Your Honor.
MR. STEPHEN HERMAN:
That was 7.
MR. GAY:
They're going to make a change on the source.
THE COURT:
8?
MR. GAY:
Yes, Your Honor.
On 8, if you take a look at 8, I don't know if The Court has it in front of you --
THE COURT:
I have it.
MR. GAY:
-- this is some type of document created from probably a -- I don't know -- I guess -- I don't know what source this document was created from. There's no source.
And it just takes these constituents of smoke and suggests that they're commonly found in other things. And then next to that, they talk about the harm from these things, which bears no relationship to the levels that these things are found in cigarette smoke.
For example, if you look at --
THE COURT:
Well, I'm looking at 8. And where on 8 are you referring to?
MR. GAY:

I'm looking at the document, "Constituents."
THE COURT:
Yes.
MR. GAY:
And if you go down underneath

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"Constituents," I'm just using this as one example, you come to formaldehyde. And it says commonly found in preserved dead body tissue. And then it says carcinogen. And then it's got these things identified by Philip Morris and identified by Philip Morris when I was there. And then you've got these other things like, for example, they'll call ammonia, up at the top, ammonia for bathroom cleaner, irritant poison.

I think this is a 403 issue, Judge. It's prejudicial to suggest these harms in connection with what these constituents or these chemicals may do in other forms. And I don't see -- I think that the demonstrative is objectionable for that reason.

THE COURT:

Overruled. I think you have an adequate remedy on cross.

9?

MR. GAY:

Objection withdrawn, Your Honor.

THE COURT:

10?

MR. GAY:

10 is argumentative, Your Honor. It's

argument. The demonstrative, WF-10, is just pure argument.

MR. STEPHEN HERMAN:

The expert's opinion is almost exactly what's in this --

THE COURT:

The objection is overruled.

11?

MR. SCHNEIDER:

They withdrew that, I think.

THE COURT:

Isn't that covered by my ruling?

MR. STEPHEN HERMAN:

Yes, it is.

Charlie, for your purposes, we'll use the actual document. Unless you want us to use the demonstrative.

THE COURT:

The objections to 11 and 12 are overruled.

13?

MR. STEPHEN HERMAN:

13 and 14 have been withdrawn, Your Honor. We're not going to use those.

THE COURT:

13 and 14 have both been withdrawn?

MR. STEPHEN HERMAN:

Yes.

THE COURT:

15?

MR. STEPHEN HERMAN:

15 is taken from The Frank Statement,

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Your Honor.
MR. GAY:
Which was not on his reliance list, Your Honor.
THE COURT:
But The Frank Statement is already in evidence; is it not?
MR. GAY:
It is, I believe, Your Honor.
THE COURT:
Well, the objection to that is overruled.
16?
MR. GAY:
Yes, Your Honor.
16 has absolutely no source to it. It's objected to for that reason.
MR. STEPHEN HERMAN:
It's a composite of his knowledge, experience and opinions. And they're all expressed in his expert report. I have a highlighted version.
THE COURT:
The objection is overruled.
17?
MR. WITTMANN:
Yes, Your Honor.
We have an objection to that demonstrative. It's a page that's taken from Plaintiffs' Exhibit 3266. That exhibit was not on the reliance list for Dr. Farone. And it's a page out of Scott Exhibit 3266, which

is referenced as the source. And that exhibit was not on the reliance list.
MR. STEPHEN HERMAN:
Your Honor, it's just a diagram. It's pretty much exactly like what Dr. Farone drew for me and would draw.
And, Phil, we took the reference off. I mean, I don't know if it needs a source. But I put the source on because we were supposed to. We can put it -- We can do it -- We've redone the demonstrative without the source so it doesn't imply that RJR knew this in the 1960s, if that's the problem. It's just an illustration.
MR. WITTMANN:
Well, it's not a document that's on the reliance list, Your Honor.
THE COURT:
Yes.
MR. WITTMANN:
And that's our objection to it.
THE COURT:
Overruled.
18?
MR. WITTMANN:
Your Honor, in connection with 17, do I understand that the reference to Scott

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Exhibit 3266 will not be on the document?
THE COURT:
I'm sorry?
MR. WITTMANN:
Do I understand that the reference to

Scott Exhibit 3266 will not be on this demonstrative?
THE COURT:
That's what I understood Mr. Herman just said.
MR. STEPHEN HERMAN:
Yeah, we can do that.
MR. GAY:
And I believe 18 was withdrawn. Am I correct, Steve?
MR. STEPHEN HERMAN:
I thought your objection was withdrawn.
MR. GAY:
Yes.
THE COURT:
The objection is withdrawn?
MR. GAY:
Right.
THE COURT:
19?
MR. STEPHEN HERMAN:
19 goes with 16. It's the rest of the chart.
MR. GAY:
Your Honor, we have the same objections to 19 as we did to 16, Your Honor.
THE COURT:
The objection is overruled.
20?
MR. GAY:
20 is okay, Your Honor. We withdraw the objection.

THE COURT:
21?
MR. GAY:
Objections to 21, Your Honor, are threefold: Preemption, it's argumentative and it's cumulative. These were all things that were gone over ad nauseam with Dr. Henningfield. And it is another way to get around preemption with respect to the FTC numbers that they were required to record.
THE COURT:
The objection is overruled.
22?
MR. STEPHEN HERMAN:
Withdrawn.
MR. BRUNO:
Withdrawn, Your Honor.
THE COURT:
23?
MR. STEPHEN HERMAN:

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That's based on Scott Exhibit 2011, which was admitted.
MR. SCHNEIDER:
I agree with that. That was admitted over our objections.
THE COURT:
The objection is overruled.
24?
MR. STEPHEN HERMAN:
24 through 38 are all based on the manufacturing process video, which is WF-5.
THE COURT:

Well, WF-5 is coming in. So 24 through 38, you're suggesting, should be overruled based on that video?
MR. STEPHEN HERMAN:
Yes, Your Honor.
THE COURT:
Comments, Mr. Gay?
MR. GAY:
If the video is coming in, Your Honor, I don't know why we need more of this. It just seems cumulative to me.
THE COURT:
The objections to WF-24 through 38 are overruled.
39?
MR. GAY:
Your Honor, on WF-39, this is again one of those documents that under 403 ought to be excluded. It's clearly an effort to prejudice the jury.
If you look down, for example, the list, it goes from additive almond butter oil, ammonia down to, let's just say, let's take the example of nutmeg as an additive to cigarettes. And then it suggests it's a hallucinogenic, it's convulsive and a number of other things, none of which it is in cigarettes. And it's just prejudicial to have this type of thing put before the jury. It's inappropriate.
THE COURT:
I think there's an adequate remedy on

cross-examination for that.
The objection to 39 is overruled.
Number 40?
MR. STEPHEN HERMAN:
40 is withdrawn, Your Honor.
THE COURT:
I'm sorry?
MR. BRUNO:
Withdrawn.
MR. STEPHEN HERMAN:
40 is withdrawn, Your Honor.
THE COURT:
41?

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MR. STEPHEN HERMAN:
We'll withdraw 41.
THE COURT:
42?
MR. STEPHEN HERMAN:
42 is a graph from 3992.01, which is, I believe -- which I think Your Honor deferred ruling.
THE COURT:
3992.01.
MR. STEPHEN HERMAN:
That's the one Dr. Farone received while he was at Philip Morris.
THE COURT:
Well, I'm going to withhold that until we decide what happens to 3992.
MR. GAY:
That's fine.
MR. STEPHEN HERMAN:

Thank you, Your Honor.
THE COURT:
43 is withdrawn?
MR. STEPHEN HERMAN:
Yes.
THE COURT:
44?
MR. GAY:
Yes, there's a problem with 44, Your Honor. Wherever this comes from, it's not on his reliance list; it's not in his report. And as you can see from the document itself, it is past his time of employment. Dr. Farone worked there from '76 to '84. And this document comes from November of '85 through November of '88.
Apparently, Dr. Farone has found a document entitled "Philip Morris Internal Annual Cigarette Information Reports," '85 to '88, and taken things out of it. The document's not on his reliance list.
Clearly, he intends to express some opinion about it. And we should have been provided this information so that we could prepare to meet it at trial.
THE COURT:
Well, you say he's apparently found some document. You have no familiarity with the Philip Morris Annual Cigarette Information Reports?
MR. GAY:
No, we found the document, Your Honor.

We found the document. But it wasn't on his reliance list.
THE COURT:
Okay. The objections are overruled.
And I presume you'd have the same arguments for the next two?

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MR. GAY:
Yes, Your Honor. They've been withdrawn, actually.
THE COURT:
I'm sorry?
MR. STEPHEN HERMAN:
We've withdrawn 45 and 46, Your Honor.
THE COURT:
Okay. 47?
MR. STEPHEN HERMAN:
We've withdrawn or we will withdraw 47.
THE COURT:
48? 48 and 49 seem to be --
MR. GAY:
Well, this is some kind of demonstrative, I guess, Dr. Farone has or the plaintiffs have put together concerning Philip Morris. It's not on his reliance list, there's no source given. It's objected to for that reason.
THE COURT:
Apparently, it's not on the reliance list. 3750?
3750 is on the reliance list.
MR. STEPHEN HERMAN:
There's a similar diagram to 3750.

That's why we provided the additional information. This diagram is made by Dr. Farone based on his personal knowledge to illustrate his testimony. I think he can lay the foundation.
THE COURT:
Objections to 48 and 49 are overruled.
50 is withdrawn?
MR. STEPHEN HERMAN:
Yes, Your Honor.
THE COURT:
51?
MR. GAY:
Your Honor, none of these were on the reliance list that make up this demonstrative.
THE COURT:
My listing has that they were on the reliance list.
MR. GAY:
Well, if you look at the exhibits they say that match up with this, they don't match up with the demonstrative. When we looked at it, they're not --
MR. STEPHEN HERMAN:
Your Honor, there are all of these patent reports which have just a little bit of information. And so I really don't know for sure whether all of these patents are in this illustrative list or not.
So I went back. And the ones that I absolutely know are in the reliance

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documents -- I mean, I could probably work with Dr. Farone to get more -- but we can just replace the exhibit with this, which are four that I know are in the reliance documents.

THE COURT:

So you've replaced 51 with what? Another 51?

MR. STEPHEN HERMAN:

Yes, Your Honor.

THE COURT:

Well, we'll talk about that in the morning. And Mr. Gay will have an opportunity to check it out.

MR. GAY:

We'll do that, Your Honor.

MR. STEPHEN HERMAN:

Here, Phil.

MR. WITTMANN:

Thank you.

THE COURT:

I need to have one. I don't have one. Okay. 52?

MR. GAY:

52 through 56 are the website that you excluded, Your Honor.

THE COURT:

Mr. Herman? I've excluded --

MR. STEPHEN HERMAN:

Yes. I think those were out based on your previous ruling.

THE COURT:

57?

MR. STEPHEN HERMAN:

57 and 58 can be withdrawn.

THE COURT:

59?

MR. STEPHEN HERMAN:

I think the objection was withdrawn to 59 and 61; is that right, Charlie?

MR. GAY:

That's correct. 59 and 61 were both withdrawn as objections.

MR. STEPHEN HERMAN:

And 60, the demonstrative, was withdrawn.

THE COURT:

That's the end.

Now, there were some other items? Do you object to those?

Are we going to hear the motion in limine today? Or you want to do that in the morning?

MR. GAY:

Whatever you prefer, Your Honor.

THE COURT:

Are the plaintiffs ready to argue the "DEFENDANTS' MOTION IN LIMINE TO BAR TESTIMONY FROM DR. FARONE ON ISSUES NOT

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IDENTIFIED IN HIS EXPERT REPORT AND NOT THE SUBJECT OF HIS PERSONAL KNOWLEDGE"?

MR. STEPHEN HERMAN:

Yes, Your Honor.

THE COURT:

All right. Mr. Gay, I have read your memorandum.

MR. GAY:

Okay, Your Honor, I appreciate that.

I just would like to point out that this issue is going to deal with that document -- Is it 3992?

MR. STEPHEN HERMAN:

.01.

MR. GAY:

.01.

And the particular diagram which I think is WF-47. Now, what we are concerned about is Dr. Farone was not tendered as an expert in disease causation. And there is nothing in his report that says low-tar cigarettes are more dangerous.

What we are concerned about is that Dr. Farone is going to use that document, 3992.01, to somehow suggest that low-tar cigarettes are more dangerous than regular tar cigarettes. And that somehow through some mutagenicity testing that he can single this out.

The report, if you look through the report, it simply doesn't show or single out low tar as being more mutagenic, it just doesn't do that. Because of that, it should be barred by CMO-2. We were not put on notice of such an opinion. We anticipate there's going to be such an opinion.

But if it's just fact testimony of

3992.01, then he can say he received it and here's what it is. But there's no question -- there can be no question, really -- that his testimony on 3992.01 will involve some type of opinion, not fact.

THE COURT:

Well, you're predicting it. And I can't rule on that until I hear the question.

MR. GAY:

I understand.

THE COURT:

And if the objection comes, I'll rule on it.

MR. GAY:

Okay.

And because of the tender involved in this case, we would also want to just alert Your Honor to what would be a forthcoming objection should he try to express some opinion about disease causation based on

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mutagenicity testing.
THE COURT:
Okay. Mr. Herman?
MR. STEPHEN HERMAN:
Well, we're kind of arguing this in a vacuum. But the specific opinion that the defendants seem to be worried about, we don't intend to elicit from Dr. Farone unless the defendants open the door.
But with respect to the issue in a more broad sense, plaintiffs completely disagree that it's not addressed in his expert report.

And in plaintiffs' memorandum, we've outlined for, I think, a page and a half, we've quoted from all the things where Dr. Farone addressed this issue.
In addition, Dr. Farone, I believe -- and I believe he testified to this this morning on his tender -- unlike Dr. Burns, was not authoring Monograph 13. He reviewed it after his expert report in this case was submitted.
And he should not be precluded from, at least as it relates to his expertise and knowledge, testifying about Monograph 13 based on the same decision that the Special Master made with respect to Burns, because the issues are completely different.
THE COURT:
I'll rule on the motion in limine in the morning after I've reviewed his report and your motion.
MR. GAY:
Just one comment on Monograph 13, Your Honor. That's not contained anywhere in Dr. Farone's report.
THE COURT:
Okay.
MR. STEPHEN HERMAN:
It wasn't published until after his report was submitted. It didn't exist.
THE COURT:
We'll recess until 9:30 tomorrow.
(Whereupon the proceedings were adjourned at 3:41 o'clock p.m.)

REPORTER'S CERTIFICATE

I, CHERYL FOURNET HUFFMAN, Registered Merit Reporter, in and for the State of Louisiana, as the officer before whom this testimony was taken, do hereby certify that this testimony was reported by me in the stenotype reporting method, was prepared and transcribed by me or under my personal direction and supervision, and is a true and correct

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transcript to the best of my ability and understanding; that I am not related to counsel or to the parties herein, nor am I otherwise interested in the outcome of this matter.

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